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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 52

JOHN TERRY, ET AL., *Petitioners*
v.
A. J. ADAMS, ET AL., *Respondents*

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONER, JOHN TERRY, ET AL.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now John Terry, Jessie Byers, R. E. Pink, Jr., Charlie Roberts, and Price Jackson, Petitioners, and respectfully submit the following Brief of their cause:

Opinions Below

The opinion of the District Court granting the Petitioners' right to vote in the primaries (R. 85-93) is reported in 90 Fed. Supp. 595. The opinion of the Court of Appeals (R. 103-114) denying Petitioners the right to vote in the primaries is reported in 193 Fed. 2d 600.

Jurisdictional Statement

Jurisdiction of this Court was invoked under 28 U.S.C.A. Section 1254 (1). The judgment of the Court of Appeals was entered on January 11, 1952 (R. 114). A petition for rehearing was filed on January 28, 1952 and was denied on February 20, 1952 (R. 115). Petition for Certiorari was presented on May 6, 1952 and was granted on November 17, 1952 (R. 117).

Petitioners are members of the Negro race (R. 37). They have been denied the right to vote in primaries of a county-wide political party solely on the ground of race or color (R. 27-28).

The trial court ruled their right to vote was guaranteed by Amendments 14 and 15 of the CONSTITUTION OF THE UNITED STATES and the provisions of 8 U. S. C. A., Section 31 (R. 85-93, 96).

The Court of Appeals for the Fifth Circuit held that the Amendments and statute were not applicable to the facts of this cause (103-114).

Whether the 14th and 15th Amendments to the CONSTITUTION OF THE UNITED STATES and the provisions of 8 U. S. C. A., Section 31, guarantee Petitioners the right to vote in primaries of a county-wide political party, presents a substantial Federal question within the jurisdiction of this Court.

Statutes Involved

The State of Texas has by statute regulated political parties with only County and Precinct organization, VERNON'S TEXAS ELECTION CODE, Article 13.54 (formerly TEX. REV. CIV. STAT. (1925) Article 3163). This statute is printed in Appendix A, p. 27, infra.

Petitioners rely in part upon 8 U. S. C. A., Section 31; this statute is printed in Appendix B, p. 28, infra.

Statement of the Case

Petitioners are members of the Negro Race and are resident citizens and qualified voters of Ft. Bend County, Texas, having poll-tax receipts or exemption certificates (R. 37). They brought the action for declaratory judgment and injunction on behalf of themselves and others like situated to determine the legality of their being excluded from voting in the Jaybird Primaries in Ft. Bend County, Texas solely on the basis of race or color (R. 2-6).

Respondents were sued individually and as representatives of a class, a county-wide political organization (R. 3). They all appeared in Court and stipulated that they were all officers of the Jaybird Democratic Association of Ft. Bend County, Texas (R. 25). Officials of the Association referred to it as the "Jaybird Party" (R. 78). The people of the County refer to it as the "Jaybird Party" (R. 59). The trial court found that the Association is commonly known as the "Jaybird Party" (R. 89).

The Jaybird Party of Ft. Bend County, Texas, officially named the Jaybird Democratic Association of Ft. Bend County, Texas, was organized in 1889 (R. 67). Since that date it has nominated for County and Precinct offices only (R. 30).

The function of the organization, as stated by Mr. A. J. Adams, its president, and Mr. R. M. Darst, an executive committeeman, is to elect the choices of the Association to public office and to have them run the government of the County (R. 46, 64).

The Association President, Mr. A. J. Adams, testified that it was not a Club such as the Rotary Club or the Lions Club and that its program was not of the character of that promoted by such clubs (R. 45).

Since 1889 the qualified voters of the County, with the

exception of Negroes, have participated in its conventions and primaries (R. 44-45, 75).

Since 1889 the nominees of this party have been the only names placed on the Democratic Primary ballots for County offices (R. 62, 78-79).

Since 1889 the nominees of this party have been the only names of the general election ballot for county offices (R. 47-48, 62, 78):

Since 1889, the nominees of this party for county offices have been elected to such offices (R. 47-48, 62, 78).

All white males and females of Ft. Bend County, Texas, who are qualified voters under the laws of the State of Texas and who have paid, or are exempt from paying, the poll tax are automatically members of the Association (R. 27, 44, 63, 74). The voting list of the county, with the exception of Negroes, comprises the membership of the Association (R. 65-106). When the elections are held the official poll tax lists are used, their being obtained free of charge from the office of the County Clerk (R. 45).

Organization of the Association parallels that of the Democratic Party in the precincts and county (R. 25, 26, 43, 76); by popular vote it chooses precinct judges for the twenty-two voting precincts of the county, who comprise the County Executive Committee (R. 25, 26, 43, 76).

Elections of the Association are called "primaries", a first primary and a run-off primary (R. 26-27). Candidates desiring to run for county or precinct offices make application to the Executive Committee and pay a filing fee set by the Executive Committee which amounts to between 2% and 3% of the salary paid for the offices to which the candidates aspire (R. 25).

Candidates in the primaries conduct public campaigns for nomination, putting up posters, announcing that they

are running for public office, distributing campaign literature, and publicizing themselves in newspapers of the county as candidates subject to the Jaybird Primaries in May (R. 48-50).

Voting in the primaries is by printed ballots and in the respective voting precincts of the county, paralleling other elections (R. 27-76). The voting is secret as in any other election (R. 76).

The votes are counted in the precincts and are then certified to the Executive Committee, which canvasses the returns and declares the result (R. 28, 76-77).

On this evidence the trial court found the Association to be a county-wide political party within the terms of TEX. REV. CIV. STAT. (1925) Art. 3163 (Now, VERNON'S TEXAS ELECTION CODE, Article 13.54); we quote the finding:

> "Such Association is a political party and comes clearly within the terms of Article 3163, Vernon's Texas Civil Statutes (1925) which regulates it and makes it an agency of the state." (R. 91-92).

The Jaybird Primaries are held in May and June of election years in advance of the statutory dates for primaries in July and August (R. 26-27, 77).

As to the purpose of not holding the primaries at the statutory times, Mr. D. R. Pearson, a founder of the Association, testified as follows:

> "Q. And if the law says they (negroes) should vote you want an election held where they cannot vote don't you?
> A. Well, I suppose I might say yes." (R. 77).

In a fuller manner Mr. A. J. Adams, President of the Association, testified to the same facts as follows:

"Q. *And then one of the purposes of your organization is for the specific purpose of excluding negroes from voting, isn't it?*

A. *Yes.*

Q. *And that is your policy?*

A. *Yes.*

Q. *I will ask you, that is the reason you hold your election in May rather than in June or July, isn't it?*

A. *Yes.*" (R. 59-60).

As to the object and purpose of the Association, the trial court made the following clear and explicit finding:

> "It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the negro any voice or part therein." (R. 89).

The constitution of the Association in Article 15 provides an extra legal, but potentially effective, method of enforcing the choice of the Association in its primaries. We quote the provision:

> "We therefore declare that any white man now residing in this county, or who shall hereafter acquire citizenship in this county, who shall undertake to lead against this association any political faction or voting population opposed to the principles and objects of this association shall be considered and treated as a social and political outcast." (R. 51-52).

To the trial judge the president of the Association testified that this provision was enforced (R. 52), though he later contradicted himself (R. 53).

The trial court found that nomination by the Jaybird Primaries is equivalent to nomination by the Democratic

Primaries and is equivalent to election in the general election; the finding is quoted:

> "There is no other organization in Fort Bend County similar to such Association, and generally the persons endorsed in the Jaybird Primary are the only persons whose names appear on the ballot at the Democratic Primaries. And such persons are almost invariably elected or nominated at such Democratic Primaries and their names appear as Democratic Nominees on the official ballot at the General Election in November. The Democratic Nominees are almost invariably elected at such General Election. *In other words, an endorsement at the Jaybird Primary generally means an election at the General Election in November.* * * *". (Emphasis ours). (R. 89).

On the above facts and fact findings the trial court entered judgment giving Petitioners the constitutional right to vote in the Jaybird Primaries (R. 93-96). The Court of Appeals did not overturn the findings of fact but held that the law applicable to the facts authorized the exclusion of the Petitioners from the primaries on the sole ground of race or color (R. 103-114).

Specification of Errors to be Urged

Petitioners urge the following errors by the Honorable Court of Appeals:

I.

In holding that the Petitioners can be excluded from the Jaybird Primaries on the sole ground of race or color.

II.

In holding that the Jaybird Primaries are not state action.

III

In failing to hold that the rule of *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, entitles the Petitioners to vote in the Jaybird Primaries.

IV.

In holding that the Fourteenth and Fifteenth Amendments to the Constitution of the United States do not guarantee to Petitioners the right to vote in the Jaybird Primaries.

V.

In holding that the Jaybird Party can avoid the mandates of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and the rule of *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, by the device of holding its primaries a few days in advance of the dates set by the state statute.

VI.

In holding in direct conflict with the decisions by the Court of Appeals for the Fourth Circuit in *Rice v. Elmore* (4th Cir.), 65 Fed. 2d 387 (Cert. Den.), and *Baskin v. Brown* (4th Cir.), 174 Fed. 2d 391.

Summary of the Argument

By statutory regulation of them the State of Texas has recognized political parties with only county-wide organization and thus has made their primaries an integral part of the state election machinery. VERNON'S TEXAS ELECTION CODE, Article 13.54 (formerly TEX. REV. CIV. STAT. (1925), Article 3163 (quoted in Appendix A)), SMITH V. ALL-

WRIGHT, 321 U.S. 649, 64 S. Ct. 757. As the trial court found the Jaybird Party to be such a political party, it is subject to this statute and its effects.

As the trial court has held the Jaybird Party to be a political party it cannot attain immunity from the Constitution of the United States nor avoid the rule of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757, by the device of violating a state statute by holding its primaries in advance of the statutory date. To permit this would place a premium on illegal conduct.

Since 1889 the Jaybird Primaries have effectively controlled and predetermined the choices in the Democratic Primaries and the general elections of the county. They are therefore controlled by the decision of this Court in SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

By engrafting its primaries onto the election processes of the State the Jaybird Party has become a *de facto* agency of the state subject to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The Jaybird Party is in actual fact the local Democratic Party.

Argument and Authorities

I.

This cause presents for consideration another device for excluding members of the Negro race from the ballot box. It functions as follows:

(1) Hold a public primary election and run-off primary election a few weeks in advance of the statutory dates for primaries.

(2) Have the only contest that really counts in these advance primaries.

(3) Exclude Negroes from voting in these advance primaries.

(4) Put the nominees of these advance primaries on the ballots in the Democratic Primaries *without opposition.*

(5) Put the same nominees on the general election ballot *without opposition.*

Thus the Jaybird Primaries predetermine and effectively control the choice in the Democratic Primaries and in the general election. Thus Negroes are denied a voice in the only election that counts. Thus Negroes are denied a voice in the government of their county. This device is but a means of circumventing the rule of SMITH v. ALLWRIGHT, 321 U.S. 648, 64 S. Ct. 757, and the mandates of the Fourteenth and Fifteenth Amendments to the CONSTITUTION OF THE UNITED STATES.

The record demonstrates almost conclusively that the Jaybird Party is in actual fact the local Democratic Party. We respectfully advance the suggestion that the Court of Appeals has failed to give sufficient weight to the abundant evidence with which the record is replete on this point: For sixty years the local Democratic organization has submitted to the decisions and desires of the Jaybird Association, for it has accepted the latter's choice without contest, thereby sanctioning and participating in the discrimination practiced. Under most all rules of evidence a sixty-year course of acquiescence would mean agreement to, cooperation with, and participation in the activity.

This sixty-year submission in a heretofore ardently Democratic state identifies the Jaybird Association as the local Democratic Party organization. Where else in this state for the past sixty years has this turbulent party been so supine? Its local conspicuous quiescence is not only suspicious; it supports and compels the conclusion that it is, by the device of the Jaybird Primary, practicing discrim-

ination forbidden by the Constitution and this Court.

We strongly urge upon this Court the significance of the decision by the Court of Appeals, and the import of legal sanction of the Jaybird Primary, as setting a pattern for further and more extensive disenfranchisement of Negro citizens.

Every conceivable device, including this one, has been used in an effort to circumvent the Constitution and to deny to the Negro race an effective voice in elections. See: GUINN v. UNITED STATES, 238 U.S. 347, 35 S. Ct. 926 (The "grandfather clause"); NIXON v. HERNDON, 273 U.S. 536, 47 S. Ct. 446 (Statutory exclusion of Negroes from primaries); NIXON v. CONDON, 286 U.S. 73, 52 S. Ct. 484 (Delegation of control of party membership to the State Executive Committee of a party); LANE v. WILSON, 307 U.S. 268, 59 S. Ct. 872 (Complicated registration procedures); SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757 (Delegation of full control of membership to political parties); BASKIN v. BROWN, 174 Fed. 2d 391 (Membership in political party clubs); RICE v. ELMORE, 165 Fed. 2d 387 (Repeal of all statutory regulations); DAVIS v. SCHNELL, 81 Fed. Supp. 872 ("Understanding and explaining" the Constitution—the "Boswell Amendment"); PERRY v. CYPHERS, 186 Fed. 2d 608 (County-wide party's primary on same date as state party's primary).

In each and every case the Courts have ultimately held in favor of the right of franchise, but those determined on discrimination have continually conceived more subtle and sophisticated modes to accomplish a purpose inconsistent with democratic tenets and at odds with the growth of the concept of government by the consent of the governed.

Can it be doubted that the device of the Jaybird Primary if given legal sanction will be seized upon in other communities and states to avoid SMITH v. ALLWRIGHT, 321

U.S. 649, 64 S. Ct. 757? If such procedures are valid on a county level, they are legal on a state level, for the same principles apply, with the result that the door is opened for circumvention of SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

II.

We urge that the Court of Appeals failed to give full effect to the Trial Court's fact finding that the Jaybird Association is a political party. Such finding is binding on appeal, unless obviously wrong. UNITED STATES v. UNITED STATES GYPSUM, 333 U.S. 364, 68 S. Ct. 525. FEDERAL RULE OF CIVIL PROCEDURE No. 52 (a).

III.

That finding of fact is amply supported by the evidence, which is reviewed under the Statement of the Case at pages 3 to 6, supra. That finding has not been set aside by the Court of Appeals.

Under the facts, it is obvious that the Association is not a club such as the Rotary Club or Lions Club; its president expressly so testified. It is equally obvious that its endorsement is not comparable to that made by a labor union or ladies circle. The organization, territorially and structurally, and in its personnel and membership, is that of a political party. Its activities are those of a political party. Its purposes are those of a political party.

A "political party" is defined as an organization of persons, or association of voters, believing in certain principles of government, that attempt through their organization to elect officers of their party faith to the controls of government. HARRELL v. SULLIVAN, 220 Ind. 108, 40 N.E. 2d 115; COOPER v. CARTWRIGHT (Okla.), 195 Pac. 2d 290.

The Courts of Texas have similarly defined the term.

WAPLES v. MARRAST, 108 Tex. 5, 184 S.W. 180; SEAY v. LATHAM, 143 Tex. 1, 182 S.W. 2d 251.

In the WAPLES Case, supra, the Court said:

> "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as means of providing a course for the government in accord with their political principles and the administration of those agencies by their own adherents. * * * ."

Similar language is found in the SEAY Case, supra; we quote:

> "A political party is a voluntary association, instituted for political purposes."

Under these definitions the Jaybird Association is a political party, for it is a voluntary association with an organized structure, erected for the purpose of obtaining and keeping control of public offices. It holds public elections, for which aspirants for office campaign, and in which the public votes, for nomination of candidates of the organization. It can reasonably be considered nothing else than a political party.

It is undisputed that the Jaybird Association is without a state organization and that its organization and activities are confined to Ft. Bend County only. Consequently, the Association was, and is, within the terms of the Texas statute governing county-wide political parties. VERNON'S TEXAS ELECTION CODE, Article 13.54. The holding of the

elections on a date other than that prescribed by the statute is considered under the next section.

IV.

It has been the argument of the Respondents that the Association is not subject to the prohibitions of the Fourteenth and Fifteenth Amendments to the CONSTITUTION OF THE UNITED STATES, nor to the provisions of 8 U. S. C. A., Sec. 31, because it does not comply with VERNON'S TEXAS ELECTION CODE, Article 13.54, providing for the primary elections to be held on the legal primary day.

The Texas statutes regulate political parties with only County-wide organization, so if the Jaybird Association is in fact such a political party, it is subject to the statute, whether it has complied with it or not. The fact finding that it is a political party with only County organization places the Jaybird Association within the provisions of the statute. Statutory control is determined not by the desires of the party involved, but by the existence or non-existence of a certain factual picture. The Trial Court concluded that fact issue against the Jaybirds.

Consider the anomaly presented by the decisions of the Court of Appeals in this case and in PERRY V. CYPHERS, 186 Fed. 2d 608. In both we find county-wide political parties. The Citizens' Party of PERRY V. CYPHERS, supra, holds its primaries on the statutory date, and must therefore submit to the prohibitions of the Constitution; the Jaybird Association, also a county-wide political party, has violated the statute by holding its primaries in advance of the statutory date, with the result that it is immune from Constitutional restraint. It necessarily follows that the Citizens' Party can attain such immunity and avoid the effect

of PERRY v. CYPHERS, supra, by following in the tracks of the Jaybirds and refusing to comply with the law.

Until and unless it can be said that the Trial Court's finding of fact that the Jaybird Association is a political party is obviously wrong, we are confronted with a premium set upon disobedience of law. A county-wide political party obtains immunity from the majesty of the Constitution of the United States by failing and refusing to obey statutory regulations of the State of Texas.

By committing the wrong of non-compliance with statutory procedures, the Jaybird Association is accomplishing the wrong of disenfranchisement. By disobedience the Association attains what would be denied it for obedience.

The testimony quoted in the Statement of the Case shows unquestionably that the specific purpose of violating the statute is to exclude negroes from voting. That is the expressed policy of the Association.

We urge the fundamental doctrine that *a litigant does not and cannot acquire superior rights on a foundation of illegal conduct. By the device of violating a state statute the Jaybird Association can neither attain immunity from, nor circumvent, the Constitution of the United States and its enabling acts.* No authority need be cited for such principle.

Elsewhere it is shown there would be no question as to the right of Negroes to vote were the statute complied with. The Association's violation of the statute does not alter the constitutional principles, for the courts will establish no premium on an illegal act.

Should the device used by the Association be approved by this Court, the larger party organization of the various states could, and some probably would adopt the procedure as another means of disenfranchising citizens of the Negro race.

The Jaybird Primaries are so interwoven with the County Primaries of the Democratic Party, and their elective processes are so commingled, as to compel the conclusion that the Jaybird Association is but a county adjunct of the Democratic Party. As said in BASKIN v. BROWN (4th Cir.), 174 Fed. 2d 391, courts of equity are not blind to the actual facts and will sweep through the cobwebs of subterfuge to strike at the source of the evil they are seeking to prevent.

But one conclusion can reasonably be reached on the device of the Jaybird Primaries—that its purpose and result is and has been to deny to the Negro citizens of Ft. Bend County, Texas an effective voice in the government of their County and Precincts. Though a sophisticated device, it cannot be sustained. LANE v. WILSON, 307 U.S. 268, 59 S. Ct. 872. There the Supreme Court of the United States, speaking of the Fourteenth Amendment as applied to elections, decreed:

> "The Amendment nullifies sophisticated as well as simple minded modes of discrimination."

So, the device of holding party primaries on dates other than those prescribed by statute, ingenious though it may be, will not be sanctioned so as to permit racial discrimination in the elective process.

V.

Consider the decision by the Court of Appeals in relation to the holding of the Fourth Circuit in RICE v. ELMORE, 165 Fed. 2d 387 (Cert. Den., 333 U.S. 875, 68 S. Ct. 905), where the State of South Carolina had repealed *all* statutes regulating political parties. Nevertheless, the Court moved upon the theory that statutory regulation was not required

in order for a political party to be an agency of the state. It concluded that political parties are state agencies by virtue of fact and custom, the presence or absence of statutory regulation not being of controlling significance.

Its conclusion was grounded on UNITED STATES v. CLASSIC, 313 U.S. 299, 61 S. Ct. 1031, which announced that "*even apart* from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice," the primary was state action because it predetermined the choice at the general election. The same doctrine was announced in NEWBERRY v. UNITED STATES, 256 U.S. 263, 285-287, 41 S. Ct. 476, 484: "As a practical matter, the ultimate choice of the mass of the voters is predetermined when the nominations have been made."

The record of the present cause is conclusive to the effect that the Jaybird Primary has predetermined the choice since 1889.

When RICE v. ELMORE, *supra*, with no statutory regulation whatsoever, is compared with the cause before us, in which the state has enacted statutory regulations, which are disobeyed, a stronger cause for the constitutional injunction is here presented. Had we no statutory regulation here, RICE v. ELMORE, *supra*, would be directly in point. Can it be possible that the attempted regulation has weakened our position?

VI.

The Court of Appeals treated the Jaybird Party as a mere private organization unfettered by the Constitutional restraints. However, political parties are today considered agencies of the state, and as such are held subject to the Constitutional mandates. SMITH v. ALLWRIGHT, 321 U.S. 649, 64 S. Ct. 757.

The basis for SMITH v. ALLWRIGHT, *supra*, was the de-

cision by this Court in UNITED STATES v. CLASSIC, 313 U.S. 299, 61 S. Ct. 1031. In that case Federal jurisdiction and constitutional regulation and control of party primaries were decreed to exist when one or more of the following factors were present:

(1) The state law makes the primary an integral part of the procedure of choice.
(2) The primary in fact effectively controls the choice.
(3) The practical influence of the choice at the primary is so great as to affect profoundly the choice at the general election.

We here quote the applicable language from the CLASSIC case, supra:

"* * * *Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,* the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, *even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice,* the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. Moreover, we cannot close our eyes to the fact already mentioned that *the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election* even though there is no

effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice. This was noted and extensively commented upon by the concurring Justices in NEWBERRY v. UNITED STATES, supra, 256 U.S. 263-269, 285, 287, 41 S. Ct. 476-478, 484, 65 L. Ed. 913." (Emphasis ours).

This doctrine of the CLASSIC decision is applicable to the Jaybird Primaries, as well as to the Democratic Primaries, for this record shows that the Jaybird Primaries effectively control, profoundly affect, and actually predetermine the choice of the County and Precinct officers in the general election. Also, the State of Texas has by statute made primaries of county-wide political parties an integral part of the procedure of choice; the statute recognizes and regulates such primaries and subjects them to other general requirements of the election code. VERNON'S TEXAS ELECTION CODE, Article 13.54. It has earlier been urged that the Jaybird Party can attain no immunity from the constitutional restraint by violation of the statutory prescriptions.

In SMITH v. ALLWRIGHT, supra, this Court expressly held that a political party could not practice racial discrimination in its primaries; there Your Honors decreed:

> *"It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."* (Emphasis ours).
>
> * * *
>
> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the

people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a *private organization* to practice racial discrimination in the election. *Consttutional rights would be of little value if they could be thus indirectly denied.* * * *" (Emphasis ours).

Further, the rationale of this Court is explained in the following language used:

"* * * The fusing by the Classic case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the Classic case cuts directly into the rationale of Grovey v. Townsend. This latter case was not mentioned in the opinion. Classic bears upon Grovey v. Townsend not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the *recognition of the place of the primary in the electoral scheme* makes clear that state delegation to a party of the power to fix the qualification of primary elections is delegation of a state function that may make the party's action the action of the state. * * *" (Emphasis ours).

In connection with this decision it should be emphasized that the Trial Court found the Jaybird Association to be a county-wide political party within the terms of VERNON'S TEXAS ELECTION CODE, Article 13.54. Consequently, racial discrimination cannot be practiced in its primaries, for as was pointed out in SMITH V. ALLWRIGHT, supra, constitutional rights would be of little value if they could be thus indirectly denied.

And the regulation of these county-wide primaries by the statutes brings this case within the rationale of the recog-

nition of these primaries in the electoral scheme of the County.

After the decision of SMITH v. ALLWRIGHT, supra, the State of South Carolina endeavored to circumvent the ruling by repealing all statutes regulating political parties on the theory that the political party would thus become a private association with the right, as a private association, to exclude negroes from primaries on the grounds of race. With the statutes repealed, the Democratic Party of South Carolina enacted party rules excluding negroes from its primaries.

The constitutionality of this action reached the appellate courts in RICE v. ELMORE (4th Cir.), 165 Fed. 2d 387 (Cert. Den., 333 U.S. 875, 68 S. Ct. 905). The party officials contended that the party rules were not prohibited by the Fourteenth Amendment, as the party was a private organization. *Rejecting this contention* the Court said:

> "The fundamental error in defendant's position consists in the premises that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, *political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people.* * * * ".
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> * * *
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> "It is true, as defendants point out, that the primary involved in Smith v. Allwright was conducted under the provisions of state law and not merely under party rules, as is the case here, but we do not think this a controlling distinction. *State law relating to the general election gives effect to what is done in the primary and makes it just as much a part of the election machinery*

of the state by which the people choose their officers as if it were regulated by law, as formerly. Elections in South Carolina remain a two step process, whether the party primary be accounted a preliminary of the general election, or the general election be regarded as giving effect to what is done in the primary; and those who control the Democratic Party as well as the state government cannot by placing the first of the steps under officials of the party rather than of the state, absolve such officials from the limitations which the Federal Constitution imposes. *When these officials participate in what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise.* * * *." (Emphasis ours).

This concept is carried forward in BASKIN v. BROWN (4th Cir.), 174 Fed. 2d 391, wherein party officials contended that the party, being unfettered by state statute was free to exclude Negroes from the primaries; we quote:

> "* * * *When the organization of the party and the primary which it conducts are so used in connection with the general election that the latter merely registers and gives effect to the discrimination which they have sanctioned, such dicrimination must be enjoined to safeguard the election itself from giving effect to that which the Constitution forbids.* * * *." (Emphasis ours).

The weight of the primaries on the results of the general election and the predetermination of the choice was recognized by Mr. Justice Pitney in NEWBERRY v. UNITED

STATES, 256 U.S. 263, 285-287, 41 S. Ct. 476, 484, when he wrote as follows:

> "* * * *it seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress.* It is a matter of common knowledge that the great mass of the American electorate is grouped into political parties, to one or the other of which voters adhere with tenacity, due to their divergent views on questions of public policy, their interest, their environment, and various other influences, sentimental and historical. So strong with the great majority of voters are party associations, so potent the party slogan, so effective the party organization, that the likelihood of a candidate succeeding in an election without a party nomination is practically negligible. As a result, every voter comes to the polls on the day of the general election confined in his choice to those few candidates who have received party nominations, and constrained to consider their eligibility, in point of personal fitness, as affected by their party associations and their obligation to pursue more or less definite lines of policy, with which the voter may or may not agree. *As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made.* * * *." (Emphasis ours).

Under the ruling of RICE v. ELMORE, supra, the Jaybird Party has by custom and practice become a state institution through which sovereign power is exercised by the people of the county. The officials of the party, participating in a part of the election machinery of the state are officers of the state *de facto* if not *de jure*, for state law relating to the primaries and the general election gives effect to what

is done in the Jaybird Primaries, though they be held in advance of the statutory dates.

The principle of BASKIN v. BROWN, *supra,* is applicable to the Jaybird Primaries for the organization of the Jaybird Party and the primaries which it conducts are so used in connection with the Democratic Primaries and the general election that the latter merely register and give effect to the discrimination sanctioned by the Jaybirds.

Similarly, the statements from NEWBERRY v. UNITED STATES, supra, are in point. The Jaybird Primaries are so closely intertwined with and related to the Democratic Primaries and the general election that an injunction against discrimination in the Jaybird Primaries is essential to avoid discrimination in the later ballotings. "*As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made*" *by the Jaybird Primaries.*

Conclusion and Prayer

On the facts and authorities presented, it is respectfully urged that the Honorable Court of Appeals was in error and that the Trial Court correctly determined the cause. The reasons are summarized as follows:

(1) The State of Texas has by statute recognized the place of the primaries of county-wide parties in the electoral scheme for choice of county officials.

(2) The State of Texas has by statute made the primaries of county-wide political parties an integral part of the procedure of choice of county officials.

(3) The Jaybird Association was found by the trial court on abundant proof to be a county-wide political party.

(4) Since 1889 the Jaybird Primaries have effectively controlled the nominations for county officials in the primaries of the Democratic party.

(5) Since 1889 the Jaybird Primaries have affected profoundly the choice of county officials in the general election.

(6) Since 1889 the Jaybird Primaries have effectively controlled the choice of county officials in the general election.

(7) State law of Texas relating to the general election gives effect to what is done in the Jaybird Primaries.

(8) By engrafting their primaries onto the state election process the Jaybird officials have become election officers of the state *de facto*, if not *de jure*.

(9) Having established an elective process of the people of the county substantially affecting and effectively controlling the exercise of sovereignty by the people of the county, the Jaybird officials cannot violate the constitutional guaranty of the right of franchise.

(10) The choice of the voters in the Democratic Primaries and the general election is predetermined by the Jaybird Primaries.

(11) The Jaybird Primaries are so used in connection with the Democratic Primaries and the general election that the latter merely register and give effect to the unconstitutional discrimination practiced by the former.

(12) The Jaybird Primaries are but a sophisticated device to bring about racial discrimination in violation of the constitutional and statutory guaranty.

WHEREFORE, Petitioners respectfully pray that this Honorable Supreme Court of the United States reverse the judgment of the Honorable Court of Appeals and affirm the judgment of the Trial Court, that it decree Petitioners and others like situated cannot be denied the right of franchise in the Jaybird Primaries on the basis of race or color and that it enjoin such discrimination.

Respectfully submitted,

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APPENDIX "A"

"VERNON'S TEXAS ELECTION CODE, ARTICLE 13.54—BY PARTIES WITHOUT STATE ORGANIZATION.

"Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a. m. and ten p. m. on the date set by law. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election. Acts 1951, 52nd Leg. P. 1097, Ch. 492, Art. 231."

NOTE: At the time this cause was tried this statute was designated TEX. REV. CIV. STAT. (1925), Article 3163. In 1951 the Texas election laws were recodified and this article was re-enacted with the phrase "on the date set by law" being substituted for "of the preceding Saturday." The statute now bears the citation given above.

APPENDIX "B"

"8 U. S. C. A., SEC. 31. RACE, COLOR, OR PREVIOUS CONDITION NOT TO AFFECT RIGHT TO VOTE.

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S., Sec. 2004."